NO. 83-506

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

CONRADO VELA,
Respondent

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITIONER'S REPLY BRIEF

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and submits this his Reply Brief.

I. THE HOLDING OF THE COURT OF APPEALS THAT PETITIONER SATISFIED THE STATUTORY EXHAUSTION REQUIREMENT

CONSTITUTES A RADICAL DEPARTURE FROM PRIOR DECISIONS OF THIS COURT AND IS A SUFFICIENT REASON TO GRANT THE WRIT OF CERTIORARI.

Respondent makes the hollow assertion that Petitioner has overstated the holding of the Court of Appeals (Brief in Opposition at 6, 7) and that the question presented "is nothing new . . ." (Brief in Opposition at 8). In fact, however, Respondent is unable to cite a single decision of this Court or any Court of Appeals which is consistent with the Fifth Circuit's holding in this case. As argued at length in the petition for writ of certiorari, the Fifth Circuit's holding is a legal aberration in that it dispenses with the long-standing requirement that a federal habeas petitioner must *fairly present* his claims to the state court in order to exhaust his state remedies. Respondent is unable to cite a single authority which has found exhaustion on claims which were never pled in the state courts.

It is axiomatic that a habeas petitioner has exhausted his state remedies when he raises a claim in the state court system regardless whether it is addressed on the merits. *Smith v. Digmon*, 434 U.S. 332 (1978). Conversely, a habeas petitioner should not be held to have exhausted his state remedies on a variety of unpled Sixth Amendment allegations simply because the state court, in denying relief, considered the totality of the circumstances. Petitioner argues that this issue is unworthy of the Court's attention because no similar case has arisen within the past three months (Brief in Opposition at 6 & n.2). Respondent does not, because he cannot, dispute the practical problems which will be caused by the Court of Appeals' holding, *i.e.*, that a state habeas court will be required to review the entire record of a criminal trial, even one comprising thousands of pages, any time a state habeas applicant alleges that the totality of counsel's representation was constitutionally deficient. There is no basis in logic or precedent for such a rule of law. Further,

this holding is clearly not confined solely to claims of ineffective assistance of counsel. Under the reasoning of Respondent and the Fifth Circuit, a habeas petitioner need only allege that the "totality" of the trial court's jury instructions were deficient without pointing to any specific error, and he will deemed to have exhausted any claim as to any conceivable defect in those instructions. *See* Petition at 12-13. Respondent's contrary assertions notwithstanding, the question presented for this Court's attention is one of exceptional importance with far-reaching consequences. If left uncorrected, the Court of Appeals' decision will seriously impinge upon the comity considerations which support this Court's decisions in *Wainwright v. Sykes*, 433 U.S. 72 (1977), *Engle v. Isaac*, 456 U.S. 107 (1982) and *Rose v. Lundy*, 445 U.S. 509 (1982). The writ should issue to review the Fifth Circuit's novel and illogical construction of the statutory exhaustion doctrine.

II. THE HOLDING OF THE COURT OF APPEALS WELL ILLUSTRATES THE TENSION THAT EXISTS BETWEEN THE PROCEDURAL DEFAULT DOCTRINE AND THE SIXTH AMENDMENT RIGHT TO COUNSEL AND CONSTITUTES A SUFFICIENT BASIS FOR ISSUANCE OF THE WRIT.

The fatal flaw in the Court of Appeals' finding of ineffective assistance is that it puts habeas petitioners in a "no lose" posture. Under the reasoning of Respondent and the Fifth Circuit, a habeas petitioner whose claims are barred by the procedural default doctrine need only recast his allegations in Sixth Amendment terms in order to obtain federal habeas corpus relief. This is an issue which surely will arise again in the Fifth Circuit and others and one which should be conclusively resolved by this Court.

Respectfully submitted,

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